NO. 2697

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN RE SOUTHERN ARIZONA SMELTING COMPANY, a corporation, *Bankrupt,*
JOHN H. MARTIN, as Trustee of the Estate of Imperial Copper Company, a corporation, Bankrupt, *Petitioner,*

vs.

M. P. FREEMAN, as Trustee of the Estate of Southern Arizona Smelting Company, a corporation, Bankrupt, *Respondent.*

BRIEF OF PETITIONER

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STATEMENT OF THE CASE

This is a petition to revise in matter of law, brought by John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, against M. P. Freeman, Trustee in Bankruptcy of Southern Arizona Smelting Company, a corporation, bankrupt, to review a certain order made by the United States District Court for the District of Arizona, in the Matter of the Southern Ari-

zona Smelting Company, a corporation, bankrupt, decreeing that the lien of a certain attachment theretofore issued and levied by the Trustee in Bankruptcy of said Imperial Copper Company, bankrupt, against the property of said Southern Arizona Smelting Company, was null and void, that the property affected thereby should be deemed released therefrom, and that the said Martin, as such Trustee, be enjoined and restrained from further prosecuting such attachment proceeding.

The Imperial Copper Company was adjudged a bankrupt upon an involuntary petition, on July 25, 1911.

On August 21, 1911, M. P. Freeman was elected Trustee in Bankruptcy of said Imperial Copper Company, and acted as such trustee until on or about July 2, 1914, at which time he resigned and petitioner herein, Martin, was elected to fill the vacancy.

At the time the copper company was adjudged a bankrupt there was due it from the Southern Arizona Smelting Company, a corporation, the sum of $28,887.71.

On January 23, 1912, said Freeman, as Trustee of the copper company, instituted an action in the then District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, against Southern Arizona Smelting Company, to recover upon said debt. Nothing was done in said action until on or about June 17, 1914, when, in obedience to an order made by the District Court upon the application of certain creditors of the copper company, the said Freeman caused an attachment to be issued in said action and the same to be levied upon the property of the smelting company.

Thereafter, on the 29th day of September, 1914, and within four months of the levying of said attachment, the Southern Arizona Smelting Company filed its *voluntary*

petition in bankruptcy in the United States District Court for the District of Arizona, was adjudicated a bankrupt on the same day, and on the 31st day of October, 1914, M. P. Freeman was elected as trustee in bankruptcy of the smelting company.

On or about March 18, 1915, the said Freeman, as Trustee in Bankruptcy of the smelting company, filed a petition in the United States District Court for the District of Arizona, in the matter of the Southern Arizona Smelting Company, a corporation, bankrupt, for an order to show cause directed against said Martin as Trustee of the Imperial Copper Company, a corporation, Bankrupt, why the said attachment lien should not be held to be null and void, and why a writ of injunction should not issue enjoining and restraining said Martin, as such trustee, from further prosecuting said attachment proceeding, alleging in said petition, among other things, that at the time of the levy of said writ of attachment the said Southern Arizona Smelting Company was and at all times since has been insolvent.

Martin, as trustee in bankruptcy of the Imperial Copper Company, appeared and filed an answer to said petition, denying that the said smelting company was insolvent at the time of the levying of said attachment, or that it was insolvent at the time of the filing of the voluntary petition in bankrupttcy by the smelting company, or that it was insolvent at any time, and alleging among other things that at the time of the levying of said writ of attachment and at the time of the filing of the voluntary petition in bankruptcy, and at all times, that the smelting company was solvent, and that the aggregate of the property of the said smelting company, exclusive of any property which it may have concealed or removed, or attempted to conceal or remove with intent to delay or defraud its creditors, was and is, at a fair valuation, sufficient in amount to pay its debts.

Martin, trustee of the copper company, in his answer to said petition, also set forth and described the property of the smelting company in detail, and also set forth a list of the debts of the smelting company as shown by the schedules filed by the smelting company and further alleged that a large portion of said debts were based upon accommodation notes of the smelting company and were not legal, proper or just debts of said company, and could not be proved or allowed in the bankruptcy proceedings.

Martin, as trustee of the copper company, in his answer to said petition, prayed that the court proceed to hear said matter and take evidence with reference to the question of the insolvency of said smelting company at the time of the levy of said attachment and at the time of the filing of said petition in voluntary bankruptcy by the said smelting company.

The District Court held that Martin, as trustee for the copper company and the holder of the attachment lien, was precluded from contesting the question of insolvency by reason of the fact that the smelting company had been adjudicated a bankrupt within four months of the levy of said writ upon its voluntary petition, and that such adjudication of the smelting company upon such voluntary petition within four months of the levy of said writ of attachment was *res adjudicata* as against the holder of the attachment on the question of insolvency.

ASSIGNMENTS OF ERROR

Petitioner relies upon the following assignments of error:

1. The Court erred in holding in effect that the adjudication of bankruptcy of said smelting company upon the voluntary petition filed by it within four months of the levy of said writ of attachment dissolved or voided the attach-

ment lien, irrespective of whether or not said smelting company was solvent or insolvent at the time of the levy of said attachment or at the time of said adjudication made upon such voluntary petition.

2. The Court erred in holding that the adjudication of bankruptcy of the smelting company upon its voluntary petition was binding and conclusive upon petitioner, a creditor of said smelting company, and *res adjudicata* of petitioner's right to test the question of solvency or insolvency of the smelting company.

3. The court erred in holding that petitioner was precluded, by reason of the adjudication so made in such voluntary petition, from contesting the question of solvency or insolvency of the smelting company.

4. The Court erred in holding that the question at issue was one of law and not one of fact to be determined upon evidence, to-wit, whether or not at the time of the levy of the attachment or at the time of the adjudication the said smelting company was solvent or insolvent.

5. The Court erred in holding in effect that although the smelting company may have been solvent at the time of the levy of the attachment, or at the time of the adjudication, that the attachment lien of petitioner was nevertheless dissolved.

6. The Court erred in denying to petitioner, a creditor of said smelting company, the right to test the question as to the solvency or insolvency of said smelting company at the time of the levy of said writ of attachment or at the time of such adjudication.

ARGUMENT

We concede at the outset that if an involuntary petition had been filed against the smelting company within four

months from the time of the levy of the writ of attachment, and the attaching creditor, the trustee of the copper company had not appeared therein and resisted the same, and an adjudication made thereon, that such adjudication would have been *res adjudicata* against petitioner herein as to the insolvency of the smelting company.

The reason for this is that upon the filing of an involuntary petition in bankruptcy all creditors become parties thereto, and especially creditors who have levied attachments upon the debtor's property within four months of the filing of the petition.

But in this case the filing of the voluntary petition in bankruptcy was purely an *ex parte* matter. The petition was filed on September 29th, 1914, and on the same day the adjudication was made. The petition did not allege that the smelting company was insolvent. (Transcript of Record, pages 57-60.) It only alleges that it owed debts which it was unable to pay in full and that it was willing to surrender all of its property for the benefit of its creditors.

Loveland on Bankruptcy, 4th Ed., p. 347: (Italics ours.) "A solvent person may file a petition in bankruptcy if he owes debts. The court will accept petitioner's statement that he owes debts which he is unable to pay in full, and that he is willing to surrender all of his property for the benefit of his creditors, except such as is exempt by law.

Same, p. 499: The adjudication is conclusive only as to the facts directly and distinctly put in issue and the finding of which is necessary to uphold the adjudication.

Same, page 500: The adjudication is conclusive on the parties and their privies in all subsequent proceedings, where an issue was made and decided in respect to the bankrupt's residence, or as to insolvency when that ques-

tion is necessarily involved, or that the debtor was subject to be adjudged an involuntary bankrupt.

Same, page 502: The adjudication binds only as to what is *actually determined* by the judge in making the order.

Same, page 985: The mere fact that a debtor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition. But where the question of insolvency is adjudged in determining an act of bankruptcy in an involuntary proceeding the fact of insolvency at the date the act was committed may be taken as established by the adjudication.

Same, page 1063: The mere fact that a debtor is adjudged a bankrupt raises no presumption of insolvency prior to the filing of the petition unless the question is adjudged in determining an act of bankruptcy in an involuntary proceeding. In that case the fact of insolvency at the date the act was committed may be deemed as established by the adjudication. The question of insolvency is one of fact to be submitted to the jury under proper instructions, when the case is tried to a jury.

Same, page 360: The judge of a court of bankruptcy regularly hears a voluntary petition and makes an adjudication or dismisses the petition. The judge opens the petition to ascertain if it is in form prescribed by the supreme court and sufficiently states facts entitling the debtor to take the benefit of the act. *These are not issuable facts. The law takes the debtor at his word.* If the petition is sufficient the adjudication is entered as a matter of course. No notice is required to creditors before making the order adjudicating the petitioner a bankrupt.

Same, page 265: The solvency or insolvency of a petitioner in voluntary bankruptcy is immaterial. A creditor cannot resist the petition on the ground that the petitioner is solvent.

Same, page 305: The adjudication of bankruptcy raises no presumption of insolvency at a previous date, unless founded upon some act of bankruptcy involving insolvency as an element. In such a case the adjudication is conclusive of insolvency at the date the act of bankruptcy was committed."

Collier on Bankruptcy, 12th Ed., page 121: "Any person who owes debts in any amount, no matter how small, may file a voluntary petition. Such filing is not an act of bankruptcy, as under the law of 1867 and the present English law, but is an *ex parte* application that gives jurisdiction to the court to decree it. A voluntary petitioner may even be solvent. There is nothing in the act which requires the person to be insolvent, and there seems to be no reason why, if a solvent person cares to have his property distributed among his creditors in bankruptcy, he should not be allowed to do so. It will not be necessary to allege insolvency in the petition, nor prove it, to procure an adjudication. A creditor may not intervene to oppose the petition.

Same, page 434: The adjudication is, like other judicial determinations, subject to the well-settled rule that matters which have been once litigated and determined by the judgment of a court cannot again be made the subject of legal contention as between the parties to such judgment and their privies. So that where the question of the bankrupt's residence, or the question of insolvency, or the amount of the petitioner's claim, were at issue, the adjudication in respect thereto is binding upon the parties and their privies in all subsequent proceedings.

Same, page 791: Whether or not a debtor is insolvent is a question of fact, and the burden of showing insolvency is on him who alleges it. The fact that a debtor is adjudged a voluntary bankrupt does not raise a presumption of insolvency prior to the filing of the petition."

In re Chappell, 113 Fed., 545: Quoting from the syllabus:

> "Where the trustee of one who was adjudged a bankrupt on his voluntary petition files a petition alleging that certain partial payments to creditors, made within four months of filing the bankrupt's petition, were made while he was insolvent, and praying that such creditors be required to return such preferential payments before being permitted to receive dividends on their claims, and the creditors answer that the bankrupt was not insolvent at the times such payments were made, no presumption arises from the adjudication in bankruptcy that the bankrupt was insolvent for four months, or any period, before his petition was filed, and hence it is incumbent on the trustee to prove the insolvency."

The Court said in its opinion: (Italics ours.)

> "Under a well-settled rule of pleading, in legal proceedings of all kinds, a party making an allegation of a fact necessary to sustain his case must prove the truth of the allegation; and this rule, in the absence of any statutory provision affecting it, governs the allegations made in the trustee's petition. He must prove that the bankrupt was insolvent when he made the payments in the petition alleged. Is his contention that there is a presumption of insolvency within the four months preceding the filing of the petition by or against the bankrupt correct? Clearly in the case under consideration—that of an adjudication on a petion filed *by,* and not *against,* the bankrupt—there is no such presumption."

Jackson vs. Valley Tie & Lumber Co., 108 Va., 714; 62 S. E., 964. (Circuit Court of Appeals of Virginia, Nov. 19, 1908.) (Syllabus.)

> "2. BANKRUPTCY — DISTRIBUTION OF ESTATE — ACTIONS — EVIDENCE — ATTACHMENT—LIEN. Under Bankruptcy Act, July 1, 1898, c. 541, sec. 67f, 30 Stat. 565, (U. S. Comp. St.

1901, p. 3450), providing that all attachments or other liens against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him are void in case he is adjudged a bankrupt, the debtor must not only be insolvent, but the insolvency must have existed at the time the lien attached.

"3. Under Bankruptcy Act, July 1, 1898, c. 541, par. 67f, 30 Stat. 565, (U. S. Comp. St. 1901, p. 3450), making void liens created against a bankrupt within four months prior to the filing of the petition, the burden of proving insolvency at the time the lien was created is on the one asserting it."

In this case the attachment was levied on September 13, 1906. On November 5, 1906, and within four months, the defendant Girard was adjudged a bankrupt on his voluntary petition. On February 19, 1907, E. H. Jackson filed a petition in the attachment suit, setting forth the adjudication of Girard as a bankrupt, the appointment of petitioner as trustee; that the plaintiff in this suit had attached a fund of about $567.37 owing to the estate of Girard by the defendant the Valley Tie & Lumber Company; and that "inasmuch as the said Girard is now a bankrupt, and as your petitioner has been appointed by the creditors of said bankrupt estate, to take charge of all the assets of said estate he has a right to require the said Valley Tie & Lumber Company to pay over to him the said sum of $567.37," and also filed a motion in writing to abate the attachment. The trustee by his attorney gave as the grounds for his motion to abate that Girard had been adjudged a bankrupt within four months after said attachment was executed, and that accordingly the said attachment and the levy thereof were null and void, under and by reason of the provisions of the Bankrupt Act, and especially Section 67f.

The Supreme Court of Appeals of the State of Virginia overruled the motion to abate on the ground that there was

no evidence or proof in the case that said Girard at the time of the obtaining of the attachment and the levy thereof as shown by the record, was insolvent. The Trustee in Bankruptcy in his appeal to the Supreme Court of Appeals of Virginia, assigned, as error, among other things, the refusal of the court to abate the attachment upon appellant's original petition filed in the case. The court in passing upon the question uses the following language:

> "Section 67f of the bankruptcy act, so far as material here, is as follows: 'That all levies, judgments, attachments or other lines obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same.'
>
> "The essential to the invalidity of any lien falling within the purview and control of the statute is that (a) the lienee must be insolvent; (b) the insolvency must have existed at the time the lien attached, or, as applied to this case, Girard must have been insolvent on September 13, 1906, the date of the levy of the attachment."

Loveland on Bankruptcy (3rd Ed.), Sec. 192c, discussing paragraph 67f of the bankruptcy act, says: "It is essential, to bring a case within the prohibition, that it appear that the lien was obtained against a person who was insolvent at the time. If it does not so appear, the lien is valid. It is not sufficient that the levy caused insolvency." See also 1 Remington on Bankruptcy, Sec. 1460.

In Simpson vs. Van Etten (C. C.), 108 Fed., 199, the opinion of the court quotes with approval from Collier's work on Bankruptcy (3rd Ed., p. 434), as follows: "Not all liens obtained against one afterwards and within four months adjudged bankrupt are deem-

ed null and void. It must appear that the person whose property is subject to the lien was insolvent at the time of the creation of the lien. It is evident a lien might be obtained against one who is adjudged bankrupt within four months thereafter, but who was not insolvent at the time the lien was obtained. The act of bankruptcy and the insolvency might have occurred at some period subsequent to the creation of the lien. If so, the adjudication of bankruptcy would in no way determine whether or not the party was insolvent at the time the lien was created."

"The burden of proof of such insolvency as is meant in paragraph 67f is held in Re Chappell (D. C.), 113 Fed., 454, to be upon the party alleging it as ground for abatement. The syllabus in that case is as follows: 'Where the trustee of one who was adjudicated a bankrupt on his voluntary petition alleging that certain partial payments to creditors, made within four months of filing the bankrupt's petition, were made while he was insolvent, and praying that such creditors be required to return such preferential payments before being permitted to receive dividends on their claims, and the creditors answered that the bankrupt was not insolvent at the times such payments were made, no presumption arises from the adjudication in bankruptcy that the bankrupt was insolvent for four months, or any period, before his petition was filed, and hence it is incumbent on the trustee to prove the insolvency.'

"In the case at bar appellant, neither in his petition filed in the lower court, nor in any statement of his grounds of motion to abate the attachment, relied upon Girard's insolvency within four months previous to his being adjudicated bankrupt, but relied solely on the ground that Girard had been adjudicated bankrupt within four months after the attachment in this case was executed, and that accordingly the attachment and the levy thereof were null and void under and by reason of the provisions of the bankruptcy act, and especially paragraph 67f thereof. So that, al-

though counsel for appellant was called upon to state in writing the grounds of his motion to abate the attachment, and was advised that the grounds of resistance of that motion were that no evidence had been adduced by the appellant, or any person, showing or tending to show that Girrard was insolvent at the date of the levy, and the obtaining of the attachment sought to be abated, he declined to furnish any evidence as to insolvency, and agreed that the court should take the case for decision upon the record as it then stood and the authorities cited by counsel. Under these conditions, the judgment of the court overruling the motion to abate the attachment was plainly right."

Stone Ordean Wells Company, a corporation, petitioner, vs. John H. Mark, Trustee of Wadena Cracker Company, a corporation, Bankrupt, respondent (C. C. A. 8th Cir.), Sept., 1915, 35 Am. Bank. Repts., 663; ??? Fed. ???.

Statement of facts by the Court:

"On April 24, 1913, Stone Ordean Wells Company, a corporation, obtained a judgment for $197.83 against Wadena Cracker Company, another corporation, in one of the district courts of the State of Minnesota, on April 26, 1913, an execution was issued thereon; on May 15, 1913, the sheriff levied this execution on a debt owing by the First National Bank of Wadena to the Cracker Company on account of moneys that had theretofore been deposited with it by the Cracker Company. The statutes of Minnesota provide that such a levy may be made by leaving with the debtor to the judgment debtor 'a certified copy of the execution with a notice specifying the property levied on' (Statutes of Minnesota, 1913, sec. 7934), and that when the officer with an execution against the defendant applies to any person mentioned in section 7934 for the purpose of levying upon a debt he owes to the defendant that person shall furnish the officer with a certificate of the debt owing to the judgment debtor. Section 7935. The bank disclosed to the sheriff its indebtedness to the Cracker Company in an amount in excess of the

judgment debt and on June 15, 1913, he collected from it by virtue of his levy $211.93, retained $10.70 in payment of his fees and costs and paid over to the Stone Company $201.23. On May 23, 1913, a creditors' petition against the cracker company praying its adjudication as a bankrupt was filed in the court below; on June 14, 1913, the Cracker Company was adjudged a bankrupt on default; on July 23, 1913, John H. Mark became trustee of its estate and on the same day he presented to that court a petition for an order on the Stone Company to pay over to him as such trustee the $211.93 the sheriff had collected from the bank. The Court issued an order on the Stone Company to show cause why the prayer of the trustee's petition should not be granted. The Stone Company objected to the granting thereof on the ground that the petition failed to present any case wherein the court had jurisdiction to determine in a summary proceeding any issue it tendered. The court below, however, after a hearing, granted the petition and ordered the Stone Company to pay to the trustee $211.93, interest thereon from June 16, 1913, and $15.00 costs on the hearing. The Stone Company has brought this petition to revise the final order below on the ground that there was no allegation in the petition for the order and no proof of the insolvency of the Cracker Company at the time of the levy and that in the absence of such allegation the bankruptcy court was without jurisdiction to avoid, in a summary proceeding, its levy and compel its repayment of the money it collected by means of the process of the state court to the trustee."

"Sanborn, Circuit Judge.

"Section 67f of the Bankruptcy Act provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same.

. . . . And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect." Act of July 1, 1898, c. 541, sec. 67f; as amended Feb. 5, 1903, c. 487, sec. 16, and June 25, 1910, c. 412, sec. 12, U. S. Comp. Stat. 1913, Sec. 9651, pages 4399, 4401.

"Counsel for the trustee cite this section and decisions under which orders made thereunder in summary proceedings avoiding liens obtained against insolvents in legal proceedings within four months of the filing of petitions in bankruptcy against them have been sustained. But the insolvency of the persons against whom the liens mentioned in this section are obtained is indispensable to their avoidance by summary proceedings thereunder. It is liens obtained through legal proceedings against an insolvent, and those only, that are avoided in case he is adjudged a bankrupt, and it is conveyances necessary to effect an avoidance of such liens and those only that the court of bankruptcy is empowered by this section to order. If a creditor by legal proceedings obtains a lien by attachment or by the levy of an execution three months before the filing of a petition in bankruptcy against his debtor who is then solvent and who does not become insolvent until the day the petition in bankruptcy is filed against him, that creditor does not obtain his lien "through legal proceedings against a person who is insolvent," but against a person who is solvent "within four months prior to the filing of the petition in bankruptcy against him," and section 67f grants the court of bankruptcy no power to avoid that lien or to order conveyances to effect that result in summary proceedings. The evident purpose of the Congress in limiting the power of the court summarily to avoid liens of the character mentioned in the section to those against insolvents and in withholding power to avoid those against solvents was to give the power to avoid such as creditors would be likely to know would probably give them a preference over other creditors, and to withhold the

power to avoid others. The natural and pertinent time of that insolvency which conditions the power of the court of bankruptcy to avoid in summary proceedings one of the liens specified in section 67f is the time when the lien is obtained. If the person is then insolvent the lien is obtained against "a person who is insolvent", if he is solvent then the lien is obtained against a person who is solvent. And the terms of the statute, their natural and rational interpretation, the meaning which first occurs to the mind on reading them and that which after meditation securely abides compel the conclusion that it was the intention of Congress and the legal effect of section 67f to grant to the courts in bankruptcy the power to effect an avoidance in summary proceedings of liens of the character there specified obtained against persons who were insolvent at the respective times the liens were obtained and those only, and that the insolvency of the person at the time the lien is acquired is an indispensable condition of the existence and of the exercise of the power. Keystone Brewing Co. vs. Schermer, 31 Am. B. R., 279, 281, 282; 88 Atl., 657; Simpson vs. Van Etten (C. C. Pa.), 6 Am. B. R., 204, 205, 206; 108 Fed., 199, 201; 1 Loveland on Bankruptcy, 909, 910, Sec. 437; Severin vs. Robinson, 27 Ind. App., 55; 60 N. E., 966; Collier on Bankruptcy, (10th Ed.), p. 963, par. e."

Counsel for respondent relied in the court below upon the case of Cook vs. Robinson, etc., decided by this court, March 18, 1912; 194 Fed., 785; in which this court held, and correctly, that the adjudication of bankruptcy in that particular case was binding and conclusive upon the attaching creditor; but in that case the involuntary petition filed against the debtor was predicated and based upon the attachment levied by Cook.

We quote from that decision as follows: (Italics ours.)

"That plaintiff in error is himself a creditor of Robinson, and it was by reason of that relationship that he was enabled to obtain an attachment against the

bankrupt's property. It is provided by the Bankruptcy Act that the bankrupt or any creditor may appear and plead to the petition (for involuntary bankruptcy) within five days after the return day, or within such further time as the court may allow. If neither the bankrupt nor any of his creditors shall so appear and controvert the facts alleged in the petition, then the judge is empowered and directed to determine as soon as may be the issues presented by the pleadings, unless for the question of insolvency or any act of bankruptcy alleged in the petition a jury is demanded. If on the last day within which pleadings may be filed, *none are filed,* the judge is authorized on the next day to make the adjudication.

"With these statutes (Pars. 67c and 67f Bankruptcy Act) in view, let us examine the petition filed for having Robinson adjudicated a bankrupt. The amended petition was filed on September 10, 1910; the original having been filed August 27th previous. The adjudication was made September 16, 1910. Among other things it sets out that Robinson is insolvent and unable to pay his debts; that within four months prior to the filing of the petition Robinson committed an act of bankruptcy, consisting in the institution by Cook of the action to recover for an indebtedness of $10,000 and interest owing by Robinson to Cook, and the levy of the attachment on July 18, 1910, and August 4, 1910, upon the property of Robinson, and the securing of an injunction by Cook against Robinson restraining the latter from disposing of any of his property, it being alleged in connection therewith that, unless Robinson is adjudicated a bankrupt, Cook will secure a preference over and above all the other creditors whose claims are equal in rank and ahead of those creditors having preferred claims, some of the claims of the latter class being set out.

"So that the petition presents two cardinal issues: *Robertson's insolvency,* and the commission of an act of bankruptcy. Upon consideration of these he was adjudged a bankrupt.

"But, however this may be, the allegation of Robinson's insolvency was essential in view of the attachments pending against his property. It must be further premised that the controversy inaugurated under the present action is wholly collateral to the proceeding in which Robinson was adjudged a bankrupt.

"Being parties to the bankruptcy proceeding, it must follow that the creditors are precluded by the adjudication upon such issues as must necessarily be determined in order to pass judgment.

"In the case at bar, as we have seen, two of the essentials to be determined in the course of the adjudication were the insolvency of the debtor, and the admission in writing of his inability to pay his debts and his willingness to be adjudicated a bankrupt on that ground, and this within four months previous to the filing of the petition. So that the plaintiff in error is precluded by the adjudication to question the insolvency of Robinson at the time of the filing of the petition in bankruptcy, and it does not affect the case that Robinson may not have been insolvent at the time the attachments of Cook were levied. This for the reason that by subdivision 'f' of section 67 all attachments levied against a person insolvent at any time within four months prior to the filing of the petition in bankruptcy are deemed null and void, in case the adjudication in bankruptcy is made. The attachment is annulled by force of the adjudication, and the trustee becomes entitled to the property free of the lien or incumbrance thereof."

In this case this Honorable Court held that Subdivision "c" of Section 67, was repugnant to the provisions of Subdivision "f", Section 67, and that Subdivision "f" must control.

Subdivision "c", Section 67, provides that: (Italics ours.)

"A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an

attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy *by or against* such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefitted thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

Subdivision "f" provides:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings, against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy *against* him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or im-

pair the title obtained by such levy, judgment, attachment, or other lien of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It will be noted that Subdivision "f" only refers to liens obtained against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy *against* him, while Subdivision "c" refers to liens obtained within four months before the filing of a petition in bankruptcy *by* or *against* such person.

The property of the smelting company consists of seven hundred and twenty acres of land (Transcript of Record, pages 21-22), and a large up-to-date smelting plant, which plant cost in excess of the sum of six hundred thousand dollars (Transcript of Record, page 18).

A detailed description of the smelting plant, machinery and equipment is contained in the record (Transcript of Record, pages 29-36).

A list of the debts is also contained in the record (Transcript of Record, pages 23-24).

The total debts as scheduled by the smelting company amounted to $144,404.72, but a portion of this alleged indebtedness, to-wit, the sum of $64,841.82 (Transcript of Record, page 24), is based upon notes which the smelting company executed as accommodation endorser and for which it received no consideration and no benefit (Transcript of Record, page 25).

This reduces the bona fide, just and valid debts of the smelting company to the sum of $79,562.90 (Transcript of Record, page 23).

We feel very confident that we will be able to prove, if permitted to do so, even though the burden of proof be cast upon us, that at the time the attachment was levied, and at

the time of filing of the voluntary petition in bankruptcy by the smelting company, and at all times, the concern was perfectly solvent, and that the aggregate of its property, exclusive of any property which it may have transferred, concealed or removed, or attempted to transfer, conceal or remove with intent to defraud, hinder or delay its creditors, was and is, at a fair valuation thereof, sufficient in amount to pay its debts.

We are contending, however, that in this case the burden of proving insolvency is upon the Trustee in Bankruptcy of the smelting company, as that is one of the material allegations of his petition filed in the District Court in his application for an order directed against the Trustee of the Copper Company, to show cause why the attachment should not be vacated.

We most earnestly insist that the order of the District Court brought up for review should be reversed, and that the Trustee in Bankruptcy of the smelting company should be required to prove that the smelting company was insolvent at the time of the levy of the attachment, and at the time of filing of the volnutary petition in bankruptcy by that company, as alleged.

Respectfully submitted,

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